No. 644

In the Supreme Court of the United States

OCTOBER TERM, 1944

MARIO JOSEPH PACIOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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No. 644

MARIO JOSEPH PACMAN, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the circuit court of appeals (R. 153–157) is reported at 144 F. (2d) 562. A rather extensive review of the case, made by the district court at the time of pronouncement of sentence, appears at pp. 124–132 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered August 28, 1944 (R. 157–158), and a petition for rehearing was denied September 30, 1944 (R. 158). The petition for a writ of certiorari was filed October 30, 1944. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions urged in the petition for a writ of certiorari are:

1. Whether the fact that petitioner's local draft board did not follow the procedures described by the Selective Service Regulations for locating and investigating delinquents before reporting petitioner to the United States Attorney, operates as a bar to the instant prosecution for failure to report for induction.

2. Whether the evidence is sufficient to support petitioner's conviction for knowingly failing to report for induction, and, in this connection, whether the trial court committed error in excluding certain evidence proffered by petitioner.

3. Whether petitioner was deprived of a fair trial by reason of alleged improper comment in the prosecuting attorney's summation to the jury.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, provides in part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Petitioner was indicted on January 13, 1943, in the District Court of the United States for the Southern District of California for knowingly, wilfully, unlawfully, and feloniously failing and neglecting to report on September 14, 1942, for induction into the armed forces, as duly directed by his local draft board, in violation of the Selective Training and Service Act of 1940 (R. 2–3).

At petitioner's jury trial the proof showed that he had registered with his local board on October 16, 1940, and filed his questionnaire (Gov. Ex. 2) on December 26, 1940 (R. 30–31). He was at that time 33 years of age, single, and had no dependents. He claimed exemption from combatant military service, but not from noncombatant military service, and stated in addition that he was a student at Los Angeles City College and requested that, if selected for

training and service, his induction be postponed until the close of the academic year ending June 1941. Under the heading "Registrant's Statement Regarding Classification," petitioner expressed doubt as to his "ability to withstand physical strain," but stated that with a few months' notice in order that he might "liquidate" he thought he would "like the service." (R. 30–31; Gov. Ex. 2.)

Petitioner was classified I–D (student) by the local board on January 6, 1941 (R. 31; Gov. Ex. 2), and was reclassified I–A (available for combatant military service) on July 8, 1941. On September 25, 1941, the local board classified petitioner I–H (over 28 years of age). (Gov. Ex. 2; cf. R. 31.) On January 15, 1942, petitioner was ordered to report for a physical examination (Gov. Ex. 2; cf. R. 31), and on January 30, 1942, he filed the special form for conscientious objectors, in which he again claimed exemption from combatant military service, stating, however, that he was "willing to participate in noncombatant service or training therefor under the direction of military authorities" (R. 31–32).[1] On March 5, 1942, petitioner wrote to the local board stating his availability for "constructive

[1] Petitioner explained the thirteen months delay between the filing of his questionnaire in December 1940 and the filing of his conscientious objectors form in January 1942 by saying that "he did not want to be looked down upon and because of circumstances, people, and general conditions" (R. 84–85).

or nondestructive work on the continent" not in conflict with his "inherent economic, social, and religious beliefs" (R. 34–35). On March 13, 1942, the local board again classified petitioner I–A and notified him of its action (R. 32–33; Gov. Ex. 2). On March 17 petitioner requested a hearing before the local board, which was granted (R. 33). The hearing was held on March 24 (R. 33, 56–57), and petitioner appeared and requested a classification of I–A–O (available for noncombatant military duty) (R. 33–34; see also R. 85). This request was granted, and on March 26, 1942, the local board sent him notice that he was classified I–A–O (R. 34, 35, 57). Petitioner wrote to the local board on March 27, 1942, in part reaffirming his willingness, "if there are no valuable civilian duties," to perform "militaristic duties within our borders for as long as they do not include the oath nor the promise that I will perform any act I think directly or indirectly destructive" (R. 69), and offering to perform various other duties under Red Cross or civilian direction abroad (R. 66, 67–71). On April 13, 1942, petitioner again wrote to the local board stating that he had heard that "1–A–O draftees are constantly goaded to change their mind, and that they take an unqualified oath to obey any command," and requesting assurance in writing from "the power that commands" that he would not be required to do "that which to me is destructive," stating also that unless

such assurance was given him, he desired "to be left alone to pursue acts which will benefit the people, and not bother my conscience" (R. 35–36; see also R. 82). The local board construed this as a request for reclassification from I–A–O to IV–E (conscientious objector); it rejected the request and notified petitioner of the rejection and of his right to appeal (R. 36, 37–38, 57).

On April 18, 1942, petitioner wrote to the appeal board, stating that unless the assurances requested in his letter of April 13 (*supra*) were given him, he requested that his letter of April 18 be considered an "appeal from 1–A–O to 4–E Classification, or another classification which *authentically assures* me the peace of mind, conscience, and nerves, and yet makes me more valuable to mankind" (R. 38–39; emphasis as in original). In accordance with Section 5 (g) of the Act and Section 627.25 of the Selective Service Regulations, the appeal board referred the matter to the Department of Justice for an advisory recommendation in respect of petitioner's claim for exemption as a conscientious objector (R. 59). On August 20, 1942, following receipt of a "Report of hearing conducted by the Department of Justice," which was adverse to petitioner's request for a IV–E classification, the appeal board unanimously sustained the local board's I–A–O classification (R. 50, 59–61), and on August 31, 1942, petitioner was notified of this action (R. 50).

On September 2 or 4, 1942, petitioner appeared at the office of the local board where, with the permission of Mrs. Sniff, the board's chief clerk (R. 29–30), he examined his file (R. 52, 96).[2] He was informed by Mrs. Sniff, as he admitted (R. 76, 77), that he would shortly receive an order to report for induction (R. 52).[3] According to Mrs. Sniff, petitioner then stated that he "wouldn't take the call, he was going to appeal" (R. 52) to "the Director of Selective Service" (R. 97). Mrs. Sniff informed him that this "would have no bearing on his induction," that the local board could not stay induction "unless advised by the Director of Selective Service" (R. 97; see also R. 80–81), and that he would be reported to the F. B. I. if he did not appear for induction, to which petitioner replied, "The Hell with the F. B. I.," and again stated that he would not

[2] Mrs. Sniff first testified that petitioner appeared at the office on September 4 (R. 52). When she was later recalled to the stand, however, she stated that she was not sure whether the date was September 2 or 4 (R. 96). Petitioner had testified in the meantime that the date was September 2 (R. 76).

[3] Mrs. Sniff testified that she informed petitioner on this occasion that a notice to report for induction "had been mailed him the previous day" (R. 52). The notice to report was mailed September 3 (R. 50; see p. 8, *infra*), and was received by petitioner September 4 (R. 81). According to petitioner's version of this conversation with Mrs. Sniff, she stated that "the Board was completely through with his case and that he might plan to receive [an] induction order within the near future" (R. 76; see also R. 77).

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appear for induction, even if he "had to go to prison" (R. 52–53).[4]

On September 2, 1942, petitioner sent a telegram to the local board in which he stated that he had received the notice of his I–A–O classification by the appeal board and that he was "appealing for presidential review through the national and state directors," and requested the local board to "stay pending induction order until answer is received" (R. 61–62, 75–76). On September 3, 1942, the local board replied to petitioner's telegram by letter, advising him that it had no authority to defer his induction, that this could be done only by the State or National Director of Selective Service, that unless the local board received such an order petitioner was required to report for induction on the date ordered, and that failure to comply with the induction order would make him subject to "severe penalty" (R. 86). With this letter the board enclosed an order directing petitioner to report for induction on September 14, 1942 (R. 50–51, 86).

[4] According to petitioner, he stated to Mrs. Sniff on this occasion that he wanted a hearing before the local board and reconsideration of his case "because the grounds upon which he had been judged were false," and that if an induction order were sent to him, he "did not know whether he would be able to fill it" (R. 76–77). Petitioner admitted that Mrs. Sniff told him that if he did not report for induction "it would be a case for the F. B. I."; he denied making the other statements she attributed to him (R. 87).

On September 4, 1942, petitioner sent a telegram to the State Director of Selective Service stating that he had just received his induction order and desired a stay of induction pending a review and that he would send the next day "conclusive proof that Presidential Review is justly necessary" (R. 77–78). The State Director replied by telegram on September 5, stating: "Upon receipt your correspondence will give matter consideration and determine appropriate action" (R. 79).

Petitioner admitted at the trial that he received the induction order on September 4 (R. 81), that he did not receive any stay of induction from the State or National Director of Selective Service (R. 90), and that he did not report for induction on September 14 (R. 81; see also R. 53). It also appears from his testimony that he did not contact the local board between September 4 and September 14 (R. 87–88; see also R. 53). On the latter date the local board sent him a notice of suspected delinquency which, in part, directed him to report to the board by mail, telegraph, or in person, before 5 p. m. on September 19, 1942 (R. 53–54).

On September 16, 1942, the State Director of Selective Service wrote to petitioner, advising him that there was nothing to indicate that his classification was erroneous or that his rights had been prejudiced, and that further action in the case was not warranted (R. 55–56). This letter admittedly was received by petitioner between Sep-

tember 17 and 19, 1942 (R. 82, 87). Mrs. Sniff testified that about September 19 petitioner telephoned the local board's office and stated that he wanted to "explain the situation" to the Board, and requested a hearing for this purpose. Mrs. Sniff advised him that "the matter was out of the hands of the Board and in the hands of the F. B. I. and to contact" the latter. (R. 53.) [5]

Meanwhile, on September 16, petitioner had written to the Governor of California, apparently requesting a deferment (see R. 103). On September 22 he was advised by the State Director of Selective Service, to whom this letter had been referred, that the Governor had no authority to grant deferments, that petitioner's case had been considered by both the local and appeal boards and he had been classified I-A-O, and that his letter to the Governor was being forwarded to the local board with the request that "it be included in your file for their consideration" (R. 103–104).

On October 2, 1942, petitioner wrote to the local board complaining, in effect, that the facts

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[5] Petitioner testified that he did not contact the local board after he had received the State Director's letter of September 16. His version of this incident was that he called the board's office the day he received the notice of suspected delinquency which had been mailed to him on the 14th (*supra*, p. 9) and ~~was~~ asked "what it meant" and when the board wanted him to report, and that Mrs. Sniff replied, "Don't bother with it, your case is in the F. B. I. hands." (R. 87–88).

upon which the advisory report of the Department of Justice was made were false, requesting an opportunity to demonstrate this to the local board, and requesting reconsideration of his classification in the light of the alleged true facts (R. 88–90).

At a preliminary examination before a United States Commissioner on October 23, 1942, petitioner was offered an opportunity to be inducted which he declined, giving as his reason therefor "the nature of the oath" (R. 105; cf. R. 90, 101, and Pet. 24), apparently referring to the oath administered to inductees (see R. 35–36, 77, 101).

For his defense, petitioner testified, *inter alia,* that, following receipt of the local board's letter of September 3, 1942, advising him that it had no authority to stay his induction and enclosing his induction order (*supra,* p. 8), he "felt he could still have recourse to the State and National Directors of the Selective Service system" (R. 86–87); that he did not report for induction on September 14 because he believed that the order was being "reviewed" (R. 82) and that he was willing to go into military service at the time he had been ordered to report had it not been for the pending appeal" (R. 90); and that he did not submit himself for induction after he had received the September 16 letter from the State Director of Selective Service advising him that the Director would take no further action in his

case, because he "expected another induction order" (R. 87).[6]

The trial court excluded certain documentary and oral evidence offered by petitioner calculated to show that the hearing before the Department of Justice hearing officer was conducted in an arbitrary manner because information in the possession of the officer which was allegedly false and prejudicial to petitioner was not communicated to him, and that the officer's report was unsupported by any evidence. An analogous offer in respect of the actions of the local and appeal boards was likewise rejected. (R. 98–99.)

The court instructed the jury[7] that the decision of the Selective Service boards in respect of a registrant's proper classification is final and conclusive, and that it was not within the jury's

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[6] Petitioner testified that he also relied upon information contained in two documents designated in the record as "defendant's Exhibits N and O for identification," which the court excluded upon objection by the Government (R. 82). Petitioner has reproduced these documents in his petition for a writ of certiorari. Exhibit O is a telegram which he sent to the National Service Board for Religious Objectors, Washington, D. C., on September 4, 1942, the date he received his order to report for induction, and is identical with the telegram he sent that day to the State Director of Selective Service (see p. 9, *supra*). Exhibit N is the National Service Board's telegraphic reply of September 5, in which the Board advised petitioner that "induction order should not have been issued until 10 days after classification." (Pet. 43–44; cf., however, p. 20, *infra*.)

[7] The bill of exceptions does not contain the full text of the court's charge, but only certain instructions stated to have been "given on behalf of the plaintiff" (R. 117–120).

province to determine whether petitioner was given a fair hearing or whether the boards erred in classifying him (R. 118–119). The jury were told that they were to determine whether petitioner received the order to report for induction and "knowingly failed to respond to" it, and that in deciding that question they were entitled to consider whether petitioner "in good faith believed the order of induction was suspended" (R. 119; see also R. 120).[8] The court refused to give to the jury certain instructions requested by petitioner which would have required an acquittal in the event the jury were to find that petitioner had not been given a full and fair hearing before the Selective Service agencies, including notice of the evidence submitted against him, or that his classification was not supported by substantial evidence (R. 110–112, 113, 115–116).

Petitioner was convicted (R. 6, 121), and on February 1, 1943, he was sentenced to imprisonment for two years (R. 6–8, 121). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed (R. 153–158).

ARGUMENT

1. Petitioner seems to contend (Pet. 13, 19, 20–23; see also Pet. 52) that the instant prosecution was foreclosed by virtue of the fact that

[8] The record indicates that the last quoted portion of this instruction was added at the suggestion of petitioner (compare R. 100 with R. 119, 120).

the local board did not follow the procedures described in Part 642 of the Selective Service Regulations, as they existed in 1942, for locating, investigating, and reporting delinquents, but instead reported his case to the United States Attorney for prosecution immediately after he had failed to report for induction on September 14, 1942 (see Pet. 22). As of that time, Section 601.5 of the regulations (6 F. R. 6825) defined a "delinquent" as any man who had failed, without a valid reason, to register or to perform any other duty imposed upon him by the Act and directions given pursuant thereto (cf. Pet. 23). Part 642 (7 F. R. 110) provided in part that the local board should mail a notice of delinquency to a registrant who it had "reason to believe * * * has become a delinquent" (Sec. 642.1 (a)) and that the board should, after mailing the notice, wait five days before taking further action (Sec. 642.2 (a)). If the board did not hear from a suspected delinquent within five days, it was to take certain designated steps to locate him (Sec. 642.2 (b) (c) (d)). Section 642.3 provided that if the suspected delinquent was located as a result of the board's efforts, or if he reported voluntarily, the board should carefully investigate the delinquency, and, if it concluded that he was innocent of any wrongful intent, it should proceed with his case as if he were never suspected of being a delinquent. Section 642.4 provided that if the board was con-

vinced that a delinquent was "not innocent of wrongful intent," or was unable to locate a suspected delinquent, it should report him to the United States Attorney for prosecution. Section 642.5 governed the procedure of the board when a delinquent reported by it to the United States Attorney later offered to comply with the law, but it expressly provided that the decision "whether such a delinquent should be prosecuted * * * rests entirely with the United States district attorney."[9]

It is clear that these regulations were merely directory upon the board and conferred no right upon petitioner to purge himself of his offense. Cf. *United States ex rel. Young* v. *Lehman*, 265 Fed. 852 (D. Md.). It was for the board to determine in the first instance whether petitioner

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[9] Amendment No. 181 of the Selective Service Regulations (8 F. R. 14115), effective November 1, 1943, deleted Part 642 in its entirety, and substituted therefor the existing provisions, which provide that a registrant who fails to comply with an order to report for induction or for work of national importance "shall be reported promptly to the United States Attorney," unless the local board believes that it may be able to locate the registrant and secure his compliance, in which event it may delay the report for 30 days (Sec. 642.41). The amended regulations also contain comprehensive provisions for classifying and inducting delinquents (Secs. 642.11–642.33), but they specifically provide (Sec. 642.2) that "Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by this part of the Selective Service Regulations is not a condition precedent to the prosecution of any person under the provisions of section 11 * * *."

had intentionally violated his duty, and in view of its apparent decision that he was not innocent of wrongful intent, it was required to report him to the United States Attorney. Under the Act, however, the offense was complete if there had been a knowing failure or neglect to perform the required duty. The procedure described by the regulations in question was not jurisdictional and did not constitute an element of the offense. *United States* v. *Dotterweich,* 320 U. S. 277, 278–279; *United States* v. *Morgan,* 222 U. S. 274. Nor was it improper in the circumstances of this case for the board promptly to report petitioner as a delinquent. He had not only been advised that his induction could not be stayed as he requested and that failure to report would result in a "severe penalty" (*supra,* pp. 7, 8), but he had stated to the board's chief clerk that he would not report (*supra,* pp. 7–8).[10]

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[10] Petitioner's assertion (Pet. 20) that he was denied an opportunity at the trial to prove that he "answered" the local board's notice of suspected delinquency, which was mailed to him on September 14, 1942 (*supra,* p. 9), is negated by the record (pp. 87–88). He himself testified that he telephoned Mrs. Sniff concerning the notice and asked her when the board wished him "to come" (*ibid.*). But his testimony is refuted by Mrs. Sniff's testimony that when he called "about September 19," he merely requested another hearing to explain "his situation" to the board (R. 53). Petitioner admitted, moreover, that he did not submit himself for induction after September 14 (R. 87), and there was no showing that he reported to the F. B. I. for that purpose after Mrs. Sniff had told him on or about September 19 that his case was in their hands and that he should "contact them" (R. 53). In-

2. Petitioner asserts that his failure to report for induction on September 14, 1942, was motivated by his belief that the induction order had been stayed and he therefore had no criminal intent (Pet. 14, 19, 26; see also Pet. 51–56), and that the trial court denied him an opportunity to introduce certain evidence to show that his true intent was not to evade induction, but to secure a proper classification (Pet. 14, 39–47). These contentions are without merit.

As shown in the Statement (*supra,* pp. 11–12), petitioner was afforded full opportunity at the trial to testify concerning his reasons for his failure to report and to adduce documents from official sources which he claims led him to believe that his I–A–O classification was being appealed to the President (see R. 61–62, 77–79, 82, 83). And in its instructions, the court told the jury that in determining the issue whether petitioner knowingly failed to report for induction as ordered, they were to consider whether he in good faith believed that the order had been suspended (R. 119, 120). The jury found the issues against petitioner, and its verdict was amply justified by the evidence showing that he had stated to the chief clerk of the local board before he had received his induction order that he would not report, and the further evidence that, despite the

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deed, as late as October 23, 1942, when he had his preliminary examination before the commissioner, petitioner refused an opportunity to submit to induction (p. 11, *supra*).

warnings of the local board and its chief clerk that the board had no authority to stay his induction and that a failure to report in accordance with the board's order would subject him to a severe penalty (*supra,* pp. 7–8), petitioner, without making any effort to ascertain whether his induction had been stayed by the State Director, of his own volition refused to report on the date ordered or at any time thereafter. As against this evidence, the jury had before it petitioner's claim of good faith based largely upon his attempt to secure an appeal to the President and upon the State Director's statement, in reply to his request for a stay and Presidential review, to the effect that the Director would give the matter consideration and determine what, if any, action should be taken upon petitioner's request (*supra,* pp. 9, 11–12).[11] Certainly, there was no implication in this advice from the State Director that he had suspended the order to report, and, particularly in view of the local board's earlier advice to petitioner that only the State or National Director had authority to stay his induction, the jury was warranted in concluding that his failure to report was not motivated, as he testified, by a good faith

[11] Petitioner had no right of appeal to the President. As of the date of his classification by the appeal board, Section 628.2 of the Selective Service Regulations limited such appeals as of right to dependency cases in which one or more members of the appeal board dissented (7 F. R. 6203). In this case, the action of the appeal board was unanimous (R. 50), and petitioner did not claim dependents.

belief that the classification given him by both the local and appeal boards was being appealed to the President. Cf. *United States* v. *Domres,* 142 F. (2d) 477 (C. C. A. 7), certiorari denied October 9, 1944, No. 225.

In respect of the contention that the trial court committed error in excluding certain evidence proffered by petitioner to show his intent (Pet. 39–47), the record shows that such evidence related largely to the propriety of his I–A–O classification and the fairness of the proceedings before the local and appeal boards and the hearing officer of the Department of Justice (see R. 97–99; Pet. 44–45). As such, it was properly excluded, for under the rule of *Falbo* v. *United States,* 320 U. S. 549, petitioner was not entitled to a review of his classification in this criminal prosecution for violation of an order to report for induction.[12]

Petitioner's complaint as to the exclusion of his exhibits O and N (R. 82; Pet. 42–44), which consisted of his telegraphic request of September 4, 1942, to the National Service Board for Religious Objectors for a stay of induction and Presidential review of his classification, and that organization's reply of September 5 to the effect that his induction order should not have been issued until

[12] The Selective Service Regulations prescribing the steps leading to induction into the armed forces which were applicable at the time of petitioner's offense were the same as those in effect at the time the *Falbo* case arose. Here, as in that case, the administrative process of selection had not been completed at the time petitioner failed to report for induction. *Falbo* v. *United States,* 320 U. S. 549, 553.

ten days after his classification (see n. 6, p. 12, *supra*), and which he asserts "informed" him that the "induction order had been prompted without authority" (Pet. 42), is equally without merit. Petitioner acknowledges that the Service Board is not an "official Selective Service office" (Pet. 42), and it is clear both that it had no authority to grant his requests and that he was not entitled to disobey his order to report on the strength of the advice which it gave him. Furthermore, upon the facts of this case, that advice was erroneous, for there is nothing in the Selective Service Regulations which required a ten-day lapse between petitioner's classification by the appeal board and issuance of the order to report for induction.[13] At best, these exhibits added nothing to the other evidence adduced by petitioner, including the State Director's advice of September 5 that he would give consideration to petitioner's request for a stay and Presidential

[13] The Service Board probably had reference to Section 625.1 of the Regulations, which provides that after classification by the local board, a registrant shall have an opportunity to appear before the board if he makes a request therefor within 10 days after the mailing of a notice of his classification. Section 625.3, which was added April 3, 1943 (8 F. R. 4292), long after petitioner had been finally classified, provides that a registrant shall not be inducted during the period afforded him by Section 625.1 to appear in person before the local board. The only limitation upon petitioner's local board in this regard was that contained in Section 627.41, which provides in substance that a registrant shall not be inducted either during the period allowed for appeal or the time an appeal is pending.

review (*supra*, p. 18), to show that his failure to report was motivated by a belief that his induction had been stayed. And, finally, the Service Board's reply could not by its very terms have been construed as authorizing a stay of induction.[14]

3. Petitioner's contention (Pet. 47–56) that Government counsel's argument to the jury contains prejudicial statements requiring reversal, is without substance. Although petitioner complained in the court below of only one sentence in counsel's argument (R. 139, 155), he now complains in addition concerning the accuracy of other statements in the summation and the inferences which might be drawn from them. In the first place, however, petitioner did not object to these remarks (R. 155; see also R. 108–110) and he is for that reason alone foreclosed from

[14] The trial court's action in not permitting petitioner to explain what he meant by the statement in his telegram to the State Director that he would "appreciate a stay of induction pending review which I shall respect," and its action in striking a statement petitioner made on direct examination concerning his motive in refusing to report, of which petitioner also complains (Pet. 39–42), were clearly correct. In respect of the first, it was for the jury, not petitioner, to interpret and weigh petitioner's statement. As to the second, petitioner's answer was not responsive to his counsel's question, and, moreover, it related primarily to the propriety of his classification. In any event, this statement was merely repetitious of petitioner's other testimony to the effect that his refusal to report was motivated by his belief that his induction order had been stayed pending further review of his classification.

raising any objection to them at this time. See, e. g., *Troutman* v. *United States,* 100 F. (2d) 628, 634 (C. C. A. 10); *Buie* v. *United States,* 76 F. (2d) 848, 849 (C. C. A. 5), certiorari denied, 296 U. S. 585; *Baldwin* v. *United States,* 72 F. (2d) 810, 812 (C. C. A. 9), certiorari denied, 295 U. S. 761; *Mendelson* v. *United States,* 58 F. (2d) 532, 534 (App. D. C.); *Cusmano* v. *United States,* 13 F. (2d) 451, 453 (C. C. A. 6), certiorari denied, 273 U. S. 773. In any event, we submit that the summation as a whole constituted a fair representation of the evidence and a proper argument. While the closing sentence (R. 110; Pet. 55–56) may have been, as the court below said, "intemperate," it is clear that it "was not of so prejudicial a character as to justify a reversal in a case as clear as this" (R. 156).

Petitioner also complains (Pet. 56–59) that certain questions the prosecuting attorney asked him were "trick" questions, factually inaccurate, and unfair, and were designed to prejudice him and mislead the jury. However, in view of petitioner's defense that his refusal to report was motivated by a belief that his induction order was being reviewed, a matter embracing in the main his mental operations, the prosecuting attorney was clearly entitled to probe into his mental state and processes as revealed by the various objective considerations concerning which she asked questions at the trial. Nothing in the questions of

which petitioner complains exceeded the bounds of legitimate cross-examination or indicates the improper motives which he ascribes to the prosecuting attorney.[15]

4. Petitioner's general assertion (Pet. 63) that "the circuit court erred in not considering thirty-four assignments of errors raised by defense" is without support in the record. The opinion of the circuit court of appeals shows that it was conceded in that court "that the decision in *Falbo* v. *United States,* 320 U. S. 549, has foreclosed argument on the bulk of the assignments of error," and that the principal contentions urged before the court pertained to Government counsel's argument to the jury, certain comments of the trial judge, and the rejection of certain exhibits offered by petitioner at the trial (R. 153, 155–157). The circuit court of appeals in its decision not only discussed these contentions (R. 155–157), and summarized the evidence, concluding with the statements, "In sum, he [petitioner] was shown beyond

[15] Petitioner's complaints (Pet. 27–28, 65–67) concerning certain comments of the trial judge are, as the court below said, "of trifling consequence" (R. 156). The judge's advice to the jury in response to a juror's question concerning the meaning of the I–A–O classification, which petitioner asserts (Pet. 27–28) prejudiced the jury toward conscientious objectors, was a fair colloquial description of the noncombatant military service to which I–A–O inductees are assigned.

debate to be a willful recalcitrant. No other verdict than that of guilty could rationally have been returned" (R. 155), but also stated, "Other assignments of error are too trivial to warrant discussion" (R. 157), thus showing that petitioner's other assignments were considered by the court. These assignments, as set forth in the petition (pp. 63–78), relate largely to rulings of the trial court excluding certain exhibits which, according to petitioner's offer of proof (R. 57–95), apparently concerned the propriety of his classification and the fairness of the proceedings before the Selective Service boards and the hearing officer of the Department of Justice, matters not open to review in this prosecution (*supra,* p. 19), and to the court's denial of certain instructions requested by petitioner concerning the effect of a good faith belief on his part that his classification was being reviewed, the substance of which, in proper form consistent with the evidence, was submitted to the jury (*supra,* pp. 13, 17).[16]

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[16] Petitioner's further complaint (Pet. 29–38) that the bill of exceptions is inaccurate in certain particulars, with the result that the circuit court of appeals did not have a true picture of the evidence, is frivolous. The bill was prepared and signed by petitioner's attorneys (see R. 121), and petitioner has no standing now to complain that it incorrectly summarizes certain of the testimony at the trial. The alleged inaccuracies are, in any event, inconsequential; and, moreover, they relate to matters concerning which the jury, who saw the witnesses and heard their testimony, could not have been misled.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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